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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
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9 UNITED STATES OF AMERICA,
10
11 v. Plaintiff,
12 DON L. BALLANTYNE, et al.,
13 Defendants.

Case No. 13cv53 BTM(BLM)
**ORDER DENYING MOTION TO
INTERVENE**

14 The Agape Way, LLC (“Agape”) has filed a motion to intervene in this
15 action. For the reasons discussed below, the Court **DENIES** without prejudice
16 the motion to intervene.
17

18 **I. FACTUAL BACKGROUND**

19 This action is a suit brought by the United States to foreclose federal tax
20 liens against two parcels of property – the “McCall” and “Fourth” properties¹ –
21 that this Court previously determined to be property of Don and Susanne
22 Ballantyne (“the Ballantynes”), to which the United States’ tax liens attach. See
23 Leeds, LP v. United States, Case No. 08cv100 BTM(BLM); Fourth Inv. LP v.
24 United States, Case No. 08cv110 BTM(BLM); Fourth Inv. LP v. United States,
25 720 F.3d 1058 (9th Cir. 2013) (affirming this Court’s judgment in favor of the
26

27
28 ¹ The “McCall” property is residential property located at 3207 McCall Street, San Diego, California, 92106. The “Fourth” property is commercial property located at 1280 Fourth Avenue, San Diego, California, 92101.

1 United States).

2 The United States seeks a decree of sale to enforce its tax liens, an order
3 adjudging that purported deeds of trust encumbering the McCall and Fourth
4 properties are fraudulent and that the transfers are null and void, and a
5 determination by the Court regarding the validity and priority of all liens on and
6 other interests in the McCall and Fourth properties.

7 Agape's interest in this action relates to the deeds of trust on the
8 properties. At some point in time, Susanne C. Ballantyne executed two deeds
9 of trust, purporting to encumber the McCall and Fourth properties in favor of
10 Eastman Investment ("Eastman"). (FAC, ¶ 60.) Susanne Ballantyne owned a
11 majority interest in Eastman. (FAC ¶ 62) The deeds of trust, which were dated
12 November 1, 1991, but were not notarized until May 1995, were allegedly given
13 in connection with a loan in November 1991 from Eastman to Susanne C.
14 Ballantyne Trust. (Id.) The United States contends that no loan was actually
15 given from Eastman to Susan C. Ballantyne Trust. (FAC ¶ 61.) Instead,
16 purported loan dispersals were made to a third party, Lark Investments, and for
17 at least one year, Lark Investments repaid the loan to Eastman. (Id.)

18 New Horizon, L.C. ("New Horizon") claims that it purchased the notes and
19 deeds of trust from Eastman. (Doc. No. 47 at 1:6-11.) Eastman retained a
20 collateral interest in the notes and deeds of trust to secure New Horizon's
21 obligation to pay Eastman the balance of the purchase price for the
22 instruments. (Id.) The United States contends that the assignment to New
23 Horizon, an entity managed by Susanne Ballantyne and her daughter, was a
24 sham and that New Horizon did not actually provide proper consideration for
25 the notes and deeds of trust. (Proposed Second Amended Complaint, ¶¶ 75-
26 83.)

27 According to Agape, Eastman is a general partnership whose partners
28 are Cramer Investment Company ("CIC"), a California general partnership, and

Investment Associates, L.P. (“IALP”). (Decl. of “Ted” Edward R. Cramer, ¶ 5.) CIC holds an 80% interest in Eastman, and IALP holds a 20% interest in Eastman. (Id. at ¶ 7.) CIC’s partners are Agape and IALP, each of which holds a 50% interest in CIC. (Id. at ¶ 5.)

Agape received its partnership interest in CIC from Edward T. Cramer, Susanne Ballantyne’s brother. (Id. at ¶ 9; FAC ¶ 62.) Agape’s managers are Dianne W. Cramer (Edward Cramer’s wife) and Ted Cramer (Edward Cramer’s son), and its sole member is Remarc Capital, LLC, which is also managed by Dianne Cramer and Ted Cramer and has as members Dianne Cramer, the children of Edward Cramer and Dianne Cramer, and trusts for their benefit. (Id. at ¶¶ 10-11.)

IALP received its partnership interests in Eastman and CIC from Susanne Ballantyne and the Susanne C. Ballantyne Trust. (Id. at ¶ 9.) According to Agape, IALP is held and controlled by Clark Ballantyne and Laura Ballantyne, the children of Susanne and Don Ballantyne, through trusts for their benefit. (Id. at ¶ 6.) IALP’s general partner is Freemont corporation, a Nevada corporation controlled by the Ballantyne children. (Id. at ¶ 6.)

II. DISCUSSION

Agape moves to intervene as a defendant in this action. Agape seeks to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a), or in the alternative, by permission of the Court pursuant to Fed. R. Civ. P. 24(b). As discussed below, the Court finds that Agape is not entitled to intervene as a matter of right and that permissive intervention is not warranted.

A. Intervention as of Right

The Court must permit anyone to intervene who “claims an interest relating to the property or transaction that is the subject of the action, and is so

1 situated that disposing of the action may as a practical matter impair or impede
 2 the movant's ability to protect its interest, unless existing parties adequately
 3 represent that interest." Fed. R. Civ. P. 24(a)(2).

4 The Ninth Circuit requires that an applicant for intervention as of right
 5 demonstrate that:

6 (1) it has a significant protectable interest relating to the property
 7 or transaction that is the subject of the action; (2) the disposition of
 8 the action may, as a practical matter, impair or impede the
 9 applicant's ability to protect its interest; (3) the application is timely;
 10 and (4) the existing parties may not adequately represent the
 11 applicant's interest.

12 United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir.2004) (quoting
 13 United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir.2002)).

14 To demonstrate a "significant protectable interest," an applicant "must
 15 establish that the interest is protectable under some law and that there is a
 16 relationship between the legally protected interest and the claims at issue."
 17 Citizens for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893, 897
 18 (9th Cir. 2011). Agape arguably has a significant protectable interest relating
 19 to the property that is the subject of the action because it has a 40% interest
 20 in Eastman, which allegedly has a security interest in the deeds of trust on the
 21 McCall and Fourth properties.

22 Furthermore, the disposition of this action may impair or impede Agape's
 23 ability to protect its interest because the United States asks the Court to
 24 adjudge the deeds of trust void due to fraudulent transfers. If the Court grants
 25 this relief, Agape will have no remaining interest in the properties.

26 As for the third factor, Agape's motion to intervene is timely because this
 27 litigation is in the pleading stage.

28 Therefore, the pivotal inquiry is whether existing parties adequately
 represent Agape's interest. In determining adequacy of representation, courts
 consider the following three factors: (1) whether the interest of a present party
 is such that it will undoubtedly make all of a proposed intervenor's arguments;

1 (2) whether the present party is capable and willing to make such arguments;
2 and (3) whether a proposed intervenor would offer any necessary elements to
3 the proceeding that other parties would neglect. Arakaki v. Cayetano, 324 F.3d
4 1078, 1086 (9th Cir. 2003).

5 The most important factor in evaluating the adequacy of representation
6 is how the proposed intervenor's interest compares with the interests of existing
7 parties. Id. There is a presumption of adequacy of representation when an
8 applicant for intervention and an existing party have the same ultimate
9 objective. Id. If the proposed intervenor's interest is identical to that of an
10 existing party, "a compelling showing should be required to demonstrate
11 inadequate representation." Id. Where parties share the same ultimate
12 objective in the litigation, "differences in litigation strategy do not normally justify
13 intervention." Id.

14 Adequacy of representation will be presumed adequate in cases where
15 a corporation, a labor union, or some other group speaks for its members.
16 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §1909. Thus,
17 absent a showing of inadequate representation by a corporation or partnership
18 that is already party to a suit, courts ordinarily will not allow shareholders or
19 partners to intervene as a matter of right. See, e.g., Stadin v. Union Elec. Co.,
20 309 F.2d 912 (8th Cir. 1962) (denying motion to intervene brought by minority
21 stockholder); Metro North State Bank v. Amcore Bank Nat'l Ass'n, 1990 WL
22 304269 (N.D. Ill. Nov. 20, 1990) (denying motion of limited partners to intervene
23 in foreclosure action.)

24 Here, Eastman speaks for its partners CIC and IALP. Agape is one more
25 step removed because it is not a partner of Eastman, but rather, is a partner of
26 CIC. At any rate, it is presumed that Eastman's representation of its partners
27 (and partners' partners) is adequate. The Court also presumes that Eastman's
28 and Agape's ultimate objective in this litigation is the same – that is, to

1 establish that the deeds of trust were valid and protect Eastman's interest in
2 the properties.

3 Agape attempts to distinguish its interest from that of Eastman. Agape
4 argues that ultimately, Eastman's partnership interests are controlled by two
5 separate families - the Ballantyne Family and the Cramer Family. Agape
6 contends that the Cramer Family takes no position regarding the Ballantyne
7 Tax litigation or the United States' fraudulent conveyance claims, but, rather,
8 only seeks to protect its own interests in Eastman. (Reply at 7:20-22.) Agape
9 explains, "Agape's only interest is in making sure that the tax liens do not
10 negatively affect the value of Agape's separate and distinct partnership
11 interests in CIC and Eastman." (Reply at 6:15-17.)

12 However, as far as the Court can tell, the only way that Agape's interest
13 in the properties will not be negatively affected is if Eastman prevails on the
14 fraudulent transfer claims. If the United States prevails, the remedy it seeks is
15 avoidance of the transfers *in their entirety*, not just as they pertain to the
16 Ballantynes. The deeds of trust were originally conveyed to Eastman, not IALP
17 or the Ballantynes, and it was Eastman that assigned the deeds of trust to New
18 Horizon. Agape has not cited any law establishing that its interests in the
19 deeds of trust are somehow severable from those of Eastman and/or the
20 Ballantyne family, allowing Agape to assert a defense insulating the Cramers'
21 interest in the properties from that of the Ballantynes. Agape may be able to
22 assert a claim of breach of fiduciary duty or other claim against IALP to recover
23 damages springing from any fraudulent conduct of IALP or the Ballantynes, but
24 this action only concerns the validity of the deeds of trusts and what priority, if
25 any, they have over other interests in the McCall and Fourth properties.

26 Absent a severable interest in the deeds of trust, Agape's objective in this
27 litigation is the same as Eastman's - to defend the validity of the deeds of trust
28 and protect Eastman's interest in the properties. Eastman has appeared in this

1 litigation and has filed a motion to dismiss the FAC. There is no evidence at
2 this time that Eastman will not vigorously defend this lawsuit. Furthermore,
3 Agape has not identified any valid defense that Eastman would be unwilling to
4 assert. Agape's inability to identify a defense different than those of Eastman
5 is underscored by Agape's failure to file a proposed amended answer as
6 required by Fed. R. Civ. P. 24(c).

7 Agape suggests that Eastman cannot adequately represent its interests
8 because Agape has commenced state court proceedings to dissolve Eastman
9 and CIC. However, IALP is opposing Agape's efforts to dissolve the entities,
10 and the proceedings are ongoing. (New Horizon RJN, Ex. 1.) Furthermore,
11 even if Eastman were to be dissolved, Eastman would remain viable for
12 purposes of wrapping up its business, including this litigation. See Cal. Corp.
13 Code § 16802(a) ("[A] partnership continues after dissolution only for the
14 purpose of winding up its business. The partnership is terminated when the
15 winding up of its business is completed.").

16 Because Agape has not made a "compelling showing" rebutting the
17 presumption that Eastman will adequately represent its interests in this action,
18 Agape is not entitled to intervene as a matter of right.

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20 B. Permissive Intervention

21 Agape also seeks permissive intervention under Fed. R. Civ. P. 24(b).
22 The Court may permit anyone to intervene who "has a claim or defense that
23 shares with the main action a common question of law or fact." Fed. R. Civ. P.
24 24(b)(1)(B). "In exercising its discretion, the court must consider whether the
25 intervention will unduly delay or prejudice the adjudication of the original
26 parties' rights." Fed. R. Civ. P. 24(b)(3).

27 Courts may also consider a number of other factors in determining
28 whether to permit permissive intervention, including:

1 the nature and extent of the intervenors' interest, their standing to
 2 raise relevant legal issues, the legal position they seek to advance,
 3 and its probable relation to the merits of the case[,] whether
 4 changes have occurred in the litigation so that intervention that was
 5 once denied should be reexamined, whether the intervenors'
 6 interests are adequately represented by other parties, whether
 7 intervention will prolong or unduly delay the litigation, and whether
 8 parties seeking intervention will significantly contribute to full
 9 development of the underlying factual issues in the suit and to the
 10 just and equitable adjudication of the legal questions presented.

11 Spangler v. Pasadena Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir.1977)
 12 (footnotes omitted).

13 Although Agape has a defense that shares with the main action a
 14 common question of law or fact since its interest in the litigation is identical to
 15 that of Eastman, the Court is not convinced that permissive intervention is
 16 warranted. Agape – a partner in CIC, which is a partner in Eastman, which
 17 purportedly holds a security interest in the deeds of trust – has an indirect
 18 interest in the McCall and Fourth properties. Furthermore, as already
 19 discussed, it is presumed that Eastman will adequately represent the
 20 partnership's interests with respect to the deeds of trust.

21 In addition, the Court tends to agree with New Horizon and the United
 22 States that Agape's participation in this action would unduly complicate the
 23 issues in this litigation and potentially prolong the lawsuit. The Court suspects
 24 that Agape would attempt to shift the focus of the litigation to the inter-family
 25 squabble. The parties would become immersed in discovery regarding the
 26 family feud and the issues in this case would be overshadowed by contentious
 27 disputes between the Cramers and Ballantynes. Accordingly, the Court, in the
 28 exercise of its discretion, denies Agape's motion for permissive intervention.

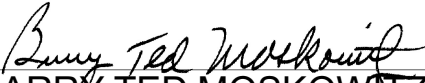
The Court's denial of Agape's motion for intervention as of right and
 motion for permissive intervention is without prejudice. If circumstances
 change such that Agape can establish that intervention is warranted (due to a
 conflict of interest or otherwise), Agape may file a new motion.

1 **III. CONCLUSION**

2 For the reasons discussed above, Agape Way's motion to intervene is
3 **DENIED WITHOUT PREJUDICE.**

4 **IT IS SO ORDERED.**

5 DATED: September 3, 2013

6 
7 BARRY TED MOSKOWITZ, Chief Judge
8 United States District Court
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